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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 167.

BOYCE MOTOR LINES, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S BRIEF.

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Opinions Below.

The opinion of the Court of Appeals (R. 20-25) is reported at 188 F. 2d 889, and the opinion of the District Court (R. 7-13) is reported at 90 F. Supp. 996.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). This appeal involves the validity of a regulation of the Interstate Commerce Commission, 49 C. F. R. 238, 1949 ed., Sec. 197.1(b), as promulgated pursuant to 18 U. S. C. 835, the pertinent provisions of both of which are set forth in full below. The judgment of the Court of

Appeals to be reviewed (R. 26) was entered on May 3, 1951. By order of Mr. Justice Burton dated May 25, 1951 (R. 28) the time for filing a petition for writ of certiorari was extended to and including July 2, 1951, and the petition was filed on that date. Writ of certiorari was granted by order of this Court entered on October 15, 1951 (R. 29).

Statement of the Case.

Petitioner was indicted by a Federal Grand Jury for the District of New Jersey on six counts. The indictment was laid under Section 835 of Title 18, U. S. Code (R. 1-6), which provides:

> "The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids; oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.
>
> * * * * * * *
>
> "Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Counts 1, 3 and 5 of the indictment only are involved here. In each of said counts petitioner is charged with violating a regulation of the Interstate Commerce Commission, i. e. 49 C. F. R. 238, 1949 Ed. Sec. 197.1 (b). This regulation reads as follows:

> "*Avoidance of congested places.* Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous clossings."

The question involved in this appeal is whether that Regulation meets the constitutional requirement that a regulation, carrying a criminal penalty, must afford an ascertainable standard of guilt.

Count 1 of the indictment (R. 1-2) charged that petitioner, a common carrier by motor vehicle, in interstate commerce, operated a motor vehicle containing a shipment of carbon bisulphide, an inflammable liquid, from Cascade Mills, New York, throughout the State of New Jersey en route to Brooklyn, New York and caused the vehicle to be driven into the Holland Tunnel at Jersey City, New Jersey, where said liquid flamed and exploded; the indictment alleged that the Holland Tunnel was a "congested thoroughfare" and that there were other "available and more practicable routes for the transportation of said shipment." It states that as a result of the "violation" bodily injury was caused to certain persons.

Counts 3 and 5 (R. 3-4, 5-6) differ from Count 1 only in respect of the dates on which the alleged violations oc-

curred and the fact that no untoward occurrence took place during the journeys.

Petitioner moved in the District Court to dismiss the indictment on various grounds, of which only the following are pertinent to this appeal:

> "2. The language of each of said counts is vague, indefinite and ambiguous and does not fully inform the defendant of the nature and extent of the crime with which it is charged."
>
> "5. The regulation, (49 C. F. R. Cumm. Supp. 197.1 (b)), upon which the offense charged in each of said counts is based, is vague, indefinite and conjectural; contains no ascertainable standard of guilt and is inadequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them."

The District Court dismissed counts 1, 3 and 5 (R. 7-12) on the ground, among others, that the Regulation by its very terms is so vague and indefinite as to make the standard of guilt conjectural and, consequently, prescribes no ascertainable standard of guilt as required by law.

The United States appealed to the Court of Appeals for the Third Circuit from the order dismissing Counts 1, 3 and 5. That court, in an opinion by Judge Maris, Circuit Judge, (R. 20-25), reversed the order of the District Court and remanded the cause with direction to reinstate Counts 1, 3 and 5. Judgment and Mandate were duly entered (R. 26-27) in the Court of Appeals.

A writ of certiorari to the Court of Appeals for the Third Circuit, on petition of petitioner, was allowed by this Court on October 15, 1951 (R. 29).

Specification of Errors.

The Court of Appeals erred in holding that the Regulation of the Interstate Commerce Commission (49 C. F. R. 238, 1949 ed., Sec. 197.1(b)) requiring drivers of motor vehicles transporting explosives and other dangerous articles to "avoid, so far as practicable and, where feasible, by the pre-arrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings", prescribes an ascertainable standard of guilt adequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them as required by the Fifth and Six Amendments to the Constitution.

ARGUMENT.

The Regulation upon which the offense charged in each of the First, Third and Fifth Counts of the Indictment is based, is vague, indefinite and conjectural; contains no ascertainable standard of guilt and is inadequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them.

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *."

This provision requires that the terms of a penal statute must be sufficiently explicit to inform persons subject to it as to what conduct on their part will render them liable to its penalties. (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89.)

A companion provision in the Fifth Amendment, prohibiting the deprivation of life, liberty and property without due process of law, stated in its simplest terms, requires that a statute which forbids the doing of an act must not be so vague that men of common intelligence must guess as to its meaning or differ as to its application. (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391.)

The test as to whether a statute violates these constitutional requirements is well stated in *Connally* v. *General Construction Co., supra,* wherein this Court, in striking down a statute requiring that general contractors working on state projects should pay employees not less than the current rate of per diem wages in the locality where the work is performed, said:

> "* * * the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties * * *
>
> "* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what

> course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another * * *.' " (p. 391-3).

In *Kraus & Bros.* v. *United States*, 327 U. S. 614, this Court, in passsing on the validity of a maximum price regulation prohibiting the evasion thereof, directly or indirectly, by way of commission, discount, "or otherwise", said:

> "The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action." (pp. 621 and 622).

The duty imposed by the statute must be sufficiently definite that reasonable men may be guided thereby and not such as would cause the minds of reasonable men to differ as to compliance with or violation of the statute. As this Court said in *Winters* v. *New York*, 333 U. S. 507, in striking down a statute prohibiting the distribution of news or stories of criminal violence so massed as to incite violence or crime:

> "The crime 'must be defined with appropriate definiteness' * * * There must be ascertainable standards of guilt. Men of common intelligence can not be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the Act * * * or in regard to the applicable tests to ascertain guilt." (pp. 515-6).

The Regulation (49 C. F. R., 197.1(b) 1949 Ed.), upon which the offense charged in Counts 1, 3 and 5 is based, provides:

> "*Avoidance of congested places.* Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

The District Court found that the Regulation did not set forth an ascertainable standard of guilt. It said in its opinion:

> "The duty is not absolute but is limited; it must be discharged only so far as practicable and where feasible. It is our opinion that these very terms are so vague and indefinite as to make the standard of guilt conjectural. Whether or not a particular course of conduct is practicable may depend, as it frequently does, on individual judgment; that which seems practicable to one may not seem practicable to another" (R. 8).

The Court of Appeals in reversing the District Court relied upon the decision of this Court in *Screws* v. *United States*, 325 U. S. 91. It pointed out that punishment in the present case could be imposed only where a defendant "knowingly violates" the regulation. The Court of Appeals based its decision upon the following quotation from the majority opinion in the *Screws* case:

> "The requirement that the act must be willful or purposeful may not render certain, for all pur-

> poses, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware" (R. 22-23).

We believe that the Court of Appeals has misapplied the decision in the *Screws* case. This Court itself pointed out, in the quotation above set forth, that the fact that an act is required to be willful does not make certain "a statutory definition of a crime which is in some respects uncertain."

The majority opinion in the *Screws* case stated:

> "Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something" (p. 105).

The issue in the *Screws* case was whether the constitutional requirements "have been defined." The majority of the Court held that the constitutional requirements involved in that case were specific and definite. It is the position of petitioner in the instant case that the duty of the trucker under the Regulation is not defined and that it is not specific and definite but left open to conjecture. To extend the doctrine of the *Screws* case to the extent done

by the Court of Appeals would over-rule the well established doctrine that "the dividing line between what is lawful and unlawful cannot be left to conjecture." *Connally v. General Construction Co., supra,* at page 393.

What does "willfulness" mean in the present situation? Naturally, trucking companies are charged with knowledge of the Regulations of the Interstate Commerce Commission. The problem that trucking companies are faced with in the above Regulation, is not lack of warning of the fact of the Regulation but rather that the requirements of the Regulation are so uncertain that no trucking company can determine with reasonable certainty, or in exercise of reasonable prudence, whether the picking of one route or another will expose it to criminal penalties.

The transportation of explosive and inflammable liquids by truck is perfectly legal and, in fact, is recognized as essential to our economy generally. The Interstate Commerce Commission has promulgated clear rules as to the packaging of such dangerous articles and the marking of the vehicles used to transport them. Such regulations must certainly be complied with and are not here in question.

When we come to the Regulation which is involved in this appeal, however, an entirely different question is presented. The facts of the present case as set forth in the indictment graphically present the problem.

Here the petitioner is charged with a crime in that in the course of transporting certain chemicals to Brooklyn, New York, petitioner's truck entered the Holland Tunnel, a vehicular crossing under the Hudson River, alleged in the indictment to be "a congested thoroughfare", when the indictment alleges that "there were other available and more

practicable routes for the transportation of said shipment." (R. 2).

Judicial notice may well be taken of the fact that it is physically impossible for a truck to go from Jersey City, New Jersey, to Brooklyn, New York, by any route at all without at some points "driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts * * *." (49 C. F. R. 238, 1949 Ed., Sec. 197.1 (b)).

The prohibition in the Regulation is not against entering or driving into such places. It is against entering or driving into them only when it is "practicable" or "feasible" to pick a route avoiding such places. No possible route could have avoided all such places.

In the present condition of our highways and of traffic in our cities it is, of course, impossible for an over-the-road trucker in almost any part of the United States to avoid *in toto* "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." In its very essence, the question before a court and jury would come down to a question, not as to whether a route is free from all of such places, but rather whether it is more free of them than another route. The Regulation becomes not a definite prohibition but a "more or less" prohibition with no standards set forth in the Regulation itself. The Court of Appeals itself recognized that the issue would not be one of choosing a route free of all the objectionable features, but one which would have been *more* free than the others. That Court said that an individual

> "will ordinarily have little difficulty in determining which of two or more practicable and feasible routes involves the *fewest* congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination." (R. 24) (Italics supplied).

The indictment itself also recognizes the "more or less" nature of the prohibition. It does not allege that there was a route which would not have led through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." Rather, it alleges that the defendant is guilty of a crime because it chose a particular route when there were "other available and *more practicable*" routes for the transportation of the shipment. (R. 4).

Who is to determine which of several routes is more practicable or feasible than another? Is the George Washington Bridge across the Hudson River with its viaduct approaches more feasible than a tunnel without viaduct approaches? Shall a truck go along street car tracks and avoid a tunnel, or go through a tunnel and avoid street car tracks? Should it go along trolley tracks to a crowded ferry, or shall it avoid the tracks and ferry and use a tunnel? Nowhere in New York City, en route to Brooklyn could a truck go without driving into or through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." No standard is set up to establish what may be

considered as more "practicable" or more "feasible". The Court of Appeals recognized that a choice between two evils would have to be made by the trucking company when it said (R. 24):

> "In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination."

The Court of Appeals seemed to feel that the mere fact that a "factual determination" had to be made by a defendant did not necessarily invalidate a statute or regulation. This, of course, is correct. But it is necessary that the standards by which that factual determination is to be made should be laid down in the regulation of statute so that the defendant, by the exercise of ordinary judgment, can reach a factual determination under the standards laid down.

If this Regulation is allowed to stand in its present form, no trucking company can, without subjecting itself to criminal penalties, enter any urban community, since no standard is set up to guide a jury in determining what is meant by "practicable" and "feasible" in the Regulation.

The result would follow that there will be an after-the-fact determination—probably depending upon the location of an accident—as to whether one route would have been more practicable or feasible than another. If the fire which is referred to in Count 1 of the indictment had occurred on a crowded ferry in New York Harbor or the congested thoroughfare of a bridge crossing the Hudson River, the defendant then undoubtedly would have been met with a

charge that the route selected by it was improper and not as practicable or feasible as the route which it took.

If the regulation had prohibited specifically entering tunnels, the duty would have been clear. It did not do so. It made the trucking companies elect, at their peril, between various routes, any one of which could be alleged to have been an improper route, subject to a later determination as to whether it was more or less feasible and practicable than another route. A trucking company would have to indulge in conjecture as to which route to take, for no possible route would be free from attack under the vague admonitions of the Regulation.

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, this Court considered the constitutionality of a state statute which prohibited combinations in restraint of trade but subject to the following proviso:

> "provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."

This Court in holding the statute unconstitutional stated:

> "Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not other-

wise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *Cohen Grocery* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this Court refused to allow as a proper standard of criminality in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 232, 233 (at p. 457).

* * * * * *

"But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act." (at p. 465).

The evil of uncertainty lurking within the framework of the Regulation, however, is not confined to the expression "so far as practicable and where feasible." It extends as well to the places prohibited to drivers of motor vehicles transporting explosives, etc., namely, "congested thorough-

fares." "places where crowds are assembled" and "dangerous crossings."

These expressions are all relative. They are not susceptible of a common interpretation. Population, place and circumstances conspire to defeat their use as ascertainable standards for the guidance of those admonished by the Regulation. A congested thoroughfare in a small village would compare favorably with one practically deserted in a large municipality. Furthermore, the degree of congestion intended by the Regulation is left entirely to conjecture and could not possibly be estimated by reference to any standard expressed or inferred therein. A thoroughfare that may seem congested to one driver may not be so regarded by another or a jury.[1]

The same argument is equally applicable to "places where crowds are assembled". That expression may readily be comprehended within the questionable meaning of "congested thoroughfares" but its appearance separately in the regulation denotes an intention to attribute to it a different interpretation. But what impression was its use

1. Particularly interesting on this point is the decision in the case of *United States* v. *Capitol Traction Co.*, 34 App. D. C. 592, where the court struck down a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding." In its decision the court said (p. 596):

> "The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what shall constitute a crowded car. This important elemen' cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment."

in the regulation intended to convey to drivers? The word "crowd" may consist, in one circumstance, of a half dozen people, and in another of hundreds or thousands depending upon such variable standards as space, location and population. Obviously there is a total lack in the Regulation of any definition or inference of what constitutes a "place where crowds are assembled" and hence there is no standard to guide those intended to be governed thereby.

Similarly, the phrase "dangerous crossings" is afflicted by the same absence of clarity and definiteness and consequently, must be judged by the same rule of statutory construction.

The test which has consistently been adopted by this Court to determine whether a criminal statute complies with the constitutional requirements is whether it uses terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." *Connally* v. *General Construction Company, supra* (at p. 391). Judged by this test, the regulation here involved fails to meet the necessary standard.

The Court below based its opinion, in part, upon the decision of this Court in *Sproles* v. *Binford*, 286 U. S. 374. In that case the Court considered, in an equity proceeding, the validity of a statute limiting the weight and load of vehicles on the highways unless they were being used to transport property to the "nearest practicable common carrier" or from such carrier to destination via the "shortest practicable route". These phrases laid down the standards with which men of ordinary intelligence could comply. The "nearest practicable common carrier" is readily ascertainable by reference to a route chart or map.

Likewise, the expression "shortest practicable route to destination" requires no more than the exercise of ordinary judgment and practical experience. The text of the statute in that case affords a definite standard of conduct which is wholly lacking in the Regulation now under consideration.

In the Court below, an endeavor was made to uphold the Regulation upon the basis of the decisions in *The Benton*, 51 Fed. 302 (1892) and in *United States* v. *Wise*, 7 Fed. 190 (1881). The statute considered by the Court in those cases prohibited the transportation of inflammable articles, including refined petroleum, on passenger vessels, but provided that such articles "may be carried on board such steamer upon routes where there is no other practicable mode of transporting it, under such regulations as shall be prescribed by the Board of Supervising Inspectors, with the approval of the Secretary of the Treasury". In that case, the exception to the prohibition in the statute was definite. It was something which could be determined as a matter of fact. It would have been the same as if in this case the Regulation had provided that inflammables could not be transported through a tunnel unless there was no other practicable way of the cargo reaching its destination. In the present case, however, the prohibition did not have this definiteness. The trucker would have to determine at his peril which of several alternative routes—through a tunnel, over a viaduct, or on congested thoroughfares—was to be selected with no standards set down by which he was to decide which route should be followed.

If we assume from the language of the indictment that the Government contends that there are "other available and more practicable routes", or if we take the decision of the Court of Appeals that the Regulation requires a trucker to choose a route with "the fewest" congested thoroughfares, etc.—then the question of practicability descends to the level of degree. Thus if the driver used what he considered the "most practicable" route, he still would be subject to prosecution if an enforcement agent or a jury conceived another route to be "more practicable". How infinite can conjecture or guessing become in order to meet the questionable intent of a vague regulation?

The statute requires the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives and other dangerous articles. They have not met the obligation of the statute by issuing a regulation which is in such general terms that no reasonable businessman can determine from the language of it what he should do or should not do in prearranging a route.

Conclusion.

The Regulation upon which the offense is charged in each of the first, third and fifth counts of the indictment is void on its face since it fails to set a reasonable standard by which a citizen may be apprised of the conduct required of him.

Therefore, it is respectfully urged that this Court reverse the decision of the Court of Appeals for the Third Circuit and direct that Counts 1, 3, and 5 of the indictment be dismissed.

Respectfully submitted,

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